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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-845

FRANK F. McDONALD, as Mayor of the City of Evansville,
CITY OF EVANSVILLE, INDIANA, et al,
Petitioners,

vs.

VETRIS C. MILLER, et al,
STATE OF INDIANA on the relation of Vetris C. Miller, et al,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

BRIEF OF RESPONDENTS IN OPPOSITION

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-845

FRANK F. McDONALD, as Mayor of the City of Evansville, Indiana
CITY OF EVANSVILLE, INDIANA
COMMON COUNCIL OF THE CITY OF EVANSVILLE, INDIANA
THOMAS L. OSSENBERG, REBECCA RATCLIFFE, JAMES H. SWONDER, JOHN M. CALDWELL, DAVID A. KOEHLER, BENJAMIN H. EVANS, JAMES F. ATHERTON, WILLIAM L. BROOKS, JAMES J. HELFRICH, as Members of and constituting the Common Council of the City of Evansville, Indiana
BOARD OF PUBLIC WORKS OF THE CITY OF EVANSVILLE, INDIANA
LOUIS IACCARINO, DOLPH VANDEVEER, A. S. PURDIE, as Members of and constituting the Board of Public Works of the City of Evansville, Indiana

Petitioners

vs.

VETRIS C. MILLER, COLUMBIA-EVANSVILLE REALTY, INC., individually and on behalf of all other persons owning apartment

buildings with more than four dwelling units in a single buildng located in City of Evansville, Indiana, similarly and singularly situated with the plaintiffs,

STATE OF INDIANA on the relation of Vetris C. Miller, Columbia-Evansville Realty, Inc., individually and on behalf of all other persons owning apartment buildings with more than four dwelling units in a single building located in City of Evansville, Indiana, similarly and singularly situated with the plaintiffs,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

BRIEF OF RESPONDENTS IN OPPOSITION

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Respondents pray that the application for a writ of certiorari to review a decision of the Supreme Court of the State of Indiana, entered on July 3, 1973, be denied.

JURISDICTION

Respondents object to the jurisdiction of this court alleged under 28 USC 1257(3) inasmuch as the judgment rendered by the Indiana Supreme Court does not

rely upon drawing into question a state statute (city ordinance) as repugnant to the Constitution of the United States or any other right claimed under the Constitution.

THE QUESTIONS PRESENTED

The Questions Presented by the Petitoners misstate and evade the real constitutonal issues which were before the Supreme Court of Indiana. The real question is as follows:

Does Article 1, Section 23 of the Constitution of the State of Indiana, or Section 1 of the Fourteenth Amendment to the United States Constitution preclude classifications in a city ordinance which operate to exclude dwellings with more than four units in a building from the collection of defined "household refuse" otherwise available to all other residential dwelling structures generating the identically defined "household refuse"?

STATEMENT OF CASE

Petitioners' statement of the case is substantially correct except that it does not adequately set forth the kind of classifications contained in Municipal Ordinance No. G-69-9, amending Chapter 933 of the Municipal Code of Evansville, Indiana (Exhibit C to Petition). The ordinance provides for collection of defined "household refuse" from defined "residential dwelling units." "Residential dwelling units" include all apartment buildings by definition. However, those apartment buildings of more than four units per building, and only those apartment buildings, are denied "house-

hold refuse" collection services solely because they are deemed by the ordinance as a "commercial enterprise," based upon the standard of number of units and totally without regard to the fact that they generate "household refuse" and are defined otherwise as "residential dwelling units."

REASONS FOR DENYING THE WRIT

1. No Jurisdiction—Indiana Judgment Rests Solely on State Law

The Supreme Court of Indiana has declared the operation of Chapter 933 of the Municipal Code of Evansville, Indiana, as amended by Municipal Ordinance No. G-69-9 unconstitutional, based upon the Indiana Constitution, being Article 1, Section 23, as well as under Section 1 of the Fourteenth Amendment to the United States Constitution. For purposes of analysis, the Indiana Supreme Court in its decisions, has deemed Article 1, Section 23 of the Constitution of the State of Indiana to be synonymous with Section 1 of the Fourteenth Amendment to the United States Constitution, and therefore has made its constitutional interpretation of the Indiana Constitution based upon precedent of United Supreme Court decisions. However, and most importantly the judgment of the Indiana Supreme Court independently rests upon that court's interpretation of the subject ordinance as unconstitutional under the standards of the Indiana Constitution, and even an incorrect interpretation of the precedents of this Honorable Court would not, for state purposes, undermine the solely state law basis for a judgment.

Besides 28 USC 1257(3) requirng reliance on a federal question as a basis for a state court judgment before this Honorable Court will have jurisdiction, Rule 19 1 a() of the Supreme Court of the United States also specifically requires a federal question of substance for its jurisdiction on a writ of certiorari of a state court decision. Respondents respectfully submit to this Honorable Court that there is no federal question, let alone one of substance to be determined. Rather the judgment of the Indiana Supreme Court can stand in and of itself as a determination of the Indiana Constitution.

In the case of *Herb v. Pitcairn*, 324 U.S. 117, 125, 89 L.Ed. 789, 65 S.Ct. 459, 463 (1945), the court stated that it will not review state court decisions resting on independent state grounds and recognizes the separation of state from the federal judicial system when it said:

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds . . . (citations omitted) The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions."

Carrying this one step further, this court has said that even if federal questions are raised along with

state issues, if the case can be decided on independent and state grounds and need not rely on the federal question, the court will not entertain jurisdiction over the matter. See *Henry v. State of Mississippi*, 379 U.S. 443, 13 L.Ed. 2d 408, 85 S.Ct. 564 (1965) and *Lynch v New York, ex rel. Pierson*, 293 U.S. 52, 79 L.Ed. 191, 55 S.Ct. 16 (1934).

The United States Supreme Court has gone so far as to hold even if, in essence, the reasoning in passage on federal question is incorrect, that if a decision or a judgment will rest on adequate state grounds, that the Supreme Court will not interfere with that decision. *Black v. Cutter Laboratories*, 351 U.S. 292, 100 L.Ed. 1188, 76 S.Ct. 824 (1956); *Williams v. Kaiser*, 323 U.S. 471, 89 L.Ed. 398, 65 S.Ct. 363 (1945).

In the case at issue it is the argument of the Petitioners that the interpretation of the applicability of the United States Constitution is incorrect. With this we respectfully disagree, but arguendo, if this would be the case the judgment still rests on an adequate state ground. As stated in the *Black* case at 298 of official reporter and at page 827 of the Supreme Court Reporter:

> "This Court, however, reviews judgments, not statements in opinions . . . This means no more than that we should not pass on federal questions discussed in the opinion where it appears that the judgment rests on adequate state grounds."

2. Petitioners' Misapplication of Unreported District Court Case

The Petitioners have attempted, by the citation of a

memorandum decision of a Federal District Court in Chicago, being *Goldstein, et al v. City of Chicago, et al,* Cause No. 72C722, which case is Exhibit D to Petitioners' petition, to suggest a dichotomy of interpretation of the Fourteenth Amediment to the Constitution, all within the Seventh Circuit, presuming, of course, that this *Goldstein* case, upon review before the Seventh Circuit will be upheld. Presumably this is an attempt to bring this within the court's Rule 19 1 (b), which applies to appeals from federal court decisions only. Not only is this appeal from a state court ruling outside that Rule of jurisdiction, but careful examination of that case indicates that while the case was brought solely on federal issues with no state issues presented in the pleadings, that the court denies relief to the plaintiff for the reason that there is no federal cause of action stated. Judge Tone said (Exhibit D, page 40 in the Petitioners' brief):

> "(If) . . . defendant officers were thus violating implicit affirmative duties with respect to plaintiffs, that violation would not give rise to a federal cause of action. Failure to follow a state statute does not, of itself, constitute a violation of a federally protected right."

The federal question discussed thereafter is merely dicta.

3. Issue Lacks Substance

Assuming, for argument sake, that the Petitioners have presented some kind of jurisdictional federal issue, the Respondents respectfully then submit that the issue is not one of substance and relates to issues

and standards already determined by this court. The Petitioners have cleverly framed the Questions Presented with a sense of the dramatic that does not really exist. In reading the Questions Presented, the reader might quickly assume that the decision of the Indiana Supreme Court requires total abandonment of refuse collection service by all municipalities or alternatively dire economic consequences.

First of all, as noted in the case of *City of New York v. Richardson*, 473 F. 2d 923, 932 (CCA2d, 1973) which case is cited as authority by the Petitioners, it must be remembered that:

> "Governmental efficiency does not legitimize unconstitutional discrimination . . ."

To follow through, it should be noted that the Petitioner City's Municipal Code, Section 933.03(1), defines "household refuse." The mere definition of the kinds of refuse to be collected immediately eliminates the requirement to collect all kinds of refuse, and immediately does away with many of the community's economic problems and gives it appropriate legislative controls. Secondly, as set forth in Section 933.04(a) of the Evansville Municipal Code, refuse collection is limited to (1) packaging in standard containers, 20-gallon containers, (2) limited in number to three containers, (3) with collection limited to a number of times per week, as provided, and (4) then only after placement of refuse containers at a curb or alley location, and in the instance of an apartment building, at a particular single location. With all of these apparently constitutional classification requirements, it becomes apparent that the great economic concern that all kinds of

refuse will have to be collected from all kinds of places in a community obviously isn't true. For example, it would be impractical for the management or residents of a 200-unit apartment building to bring to a single outside collection point, up to ~~800~~ 200-gallon containers with their refuse once a week. Unlike the individual residence or smaller apartment dwellings, larger sized residential dwellings generating the defined substance are for all practical purposes practically precluded from the benefits of collection service. In essence, the various classifications applied for collection in terms of numbers of cans, location of collections, kinds of refuse collected and frequency of collection serves to discriminate against certain kinds of residential dwellings, namely larger apartment buildings. This kind of discrimination would undoubtedly be permitted under the standards of the various cases cited by the Petitioners in their brief. But this kind of discrimination is not before the court.

The kind of discrimination that the Indiana Supreme Court found to be invalid and unjustified is an arbitrary definition of what kind of residential dwelling units generating household refuse are commercial and what are not commercial, as that classification relates to the subject matter of refuse collection.

The Petitioners suggest that the standards applied in determination of the issue by the Indiana Supreme Court, based upon the case of *United States v. Maryland Savings-Share Insurance Corp.*, 400 U.S. 4, 91 S.Ct. 16, 27 L.Ed. 2d 4 (1970) is a wrong standard and in turn cites as an appropriate standard language from *McGowan v. State of Maryland*, 366 U.S. 420, 6 L.Ed. 2d 393, 81 S.Ct. 1101 (1961). See Petitioners' petition at pp. 10-11.

First of all, it should be pointed out that the *Maryland Savings* case sets forth its standard, citing as its authority the *McGowan* case. Presumably the standard adopted by the later *Maryland Savings* case is either the same standard or at least a later modification by this Honorable Court of the *McGowan* decision. While there are some differences in the words, the standards in the *Maryland Savings* case of discrimination being "perceived," and in the *McGowan* case of it "may be conceived," would seem to be an argument of semantics and not supported by any other language or discussion of the court and certainly not of real substance. The Indiana court has recognized that it cannot perceive a set of facts rationally justifying the classification contained in the subject ordinance, and this should certainly sufficiently meet the constitutional standards and demonstrate appropriate effort by the Indiana court in examining and then declaring the subject Municipal Code unconstitutional in its operation.

While the Indiana court has met the standard set forth in the *Maryland Savings* case, which follows *McGowan* a proper standard which would not have been as stringent for the Indiana court to come within is found in *Reed v. Reed*, 404 U.S. 71, 30 L.Ed. 2d 225, 92 S.Ct. 251 (1971); see also *Eisenstadt v. Baird*, 405 U.S. 438, 31 L.Ed. 2d 349, 92 S.Ct. 1029 (1972) and *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 33 L.Ed. 2d 212, 92 S.Ct. 2286 (1972) The *Reed v. Reed* standard reads:

"The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the

> basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike'."

See in particular the extensive analysis of a possible shifting of the Supreme Court's equal protection doctrine from *Maryland Savings* as discussed by the Honorable Judge Irving R. Kaufman of the Second Circuit in *The City of New York v. Richardson, supra*, 931, cited by Petitioners as authority, where the court concludes:

> "Clearly, these decisions seem to foreshadow an expanded judicial inquiry under the Equal Protection Clause . . ."

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Petitioners' Petition For Writ of Certiorari be denied.

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